85-271

Supreme Court, U.S.
FILED
JUL 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. .. ..

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

State of California,

Petitioner,

vs.

Walnut Properties, Inc.

and Vincent Miranda

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE DEPARTMENT
OF THE SUPERIOR COURT,
LOS ANGELES, CALIFORNIA

JOHN ANTHONY VANDER LANS,
City Prosecutor,
GERRY LEE ENSLEY
Deputy City Prosecutor,
400 West Broadway,
Suite 207
Long Beach, California 90802
(213) 437-0711
Counsel for Petitioner.

QUESTIONS PRESENTED.

1. Will state courts be allowed to construe "out of existence" the Detroit-type noncluster adult entertainment ordinance by ostensible First Amendment interpretation requiring a *de facto* unenforceable fluctuating standard of "preponderant use" before a movie theater may be deemed to be an "adult" theater?

2. Where is the constitutional line between municipal porn-zoning, created by *Young v. American Mini Theaters, Inc.*, and state preemption by "independent state grounds" which destroys all statewide experimentation by that state's municipalities (including independent "charter" municipalities) to be drawn? Is this Court powerful enough to preserve against extinction by federalism what it correctly created in *Young* ?

TABLE OF CONTENTS

Page

Questions Presented i

Opinion Below 1

Jurisdiction 2

Statement of Case 2

Reasons for Granting the Writ 13

I. *Pringle's* "preponderant use" Standard of First Amendment construction destroys all aspects of porn-zoning (in both its cluster--Boston--and noncluster--Detroit--variations) in vitiation of this court's *Young imprimatur* for municipal "experimentation" in porn-zoning 13

II. Where as herein the *Pringle*-mandated state porn-zoning standard destroys the essence of porn-zoning by initiating a requirement of fluctuating "preponderant use" and where the movie theater has in fact reverted to 100% porn exhibition at

Page

one of its two (2) interior screens, that standard must bow to *Young's* authorization of municipal rights even if that state standard be based upon "independent state grounds" 23

III. The state constitution allows "charter" cities, such as Long Beach, plenary police power control of "local affairs" such as porn-zoning, yet *Pringle's* erroneous "preponderant use" standard triggers state preemption of the federal concept of porn-zoning and invites further state incursion by preempting all sex-related depiction in general 29

IV. *Young* never invited state "narrowing" construction" of the statutory phrase "used" 33

V. The parameters of federal due process protection of municipal

Page

porn-zoning need not be broad in order to reverse *Pringle* (2) on our instant facts 42

VI. There is no conflict between zoning's traditional "single instance" land use and factual *de minimis* because (1) deleterious secondary effects are presumed even from a single showing, (2) zoning requires single instance in order to be feasible, and (3) allowing a "variable quantum" defense will inundate this high-court with innumerable appeals/writs demanding factual quantification of the amount of porn exhibited and its consequent neighborhood secondary effects 45

Conclusion 57

INDEX TO APPENDICES

Appendix A. Opionion in the Appellate Department of the Superior Court, State

Page

of California, County of Los Angeles .....

.....App.p. 1

Appendix B. Order denying rehearing and

certification .....App.p. 23

TABLE OF AUTHORITIES

Cases

California v. LaRue (1972) 409 U.S. 109

[34 L.Ed.3d 390; 93 S.Ct. 390] 31

City of Renton v. Playtime Theaters, Inc.,

U.S. Sup.Ct.No. 84-1360 10

Coffineau v. Fong Eu (1977) 68 Cal.App.3d

138 [137 Cal. Rptr. 90] 29

County of Sacramento v. Superior Court, etc.

(1982) 137 Cal.App.3d 448 [187 Cal.Rprt.

154] 49

In re Lance W. (1985) 37 Cal.3d 873 [210

Cal.Rptr. 631, 694 P.2d 744] 26

Kuhns V. Board of Supervisors (1982) 128

Cal.App.3d 269 [181 Cal.Rptr. 1] 13

Lloyd Corp. v. Tanner (1972) 407 U.S. 551

[33 L.Ed.2d 131, 92 S.Ct. 2219] 39

Metromedia, Inc. v. San Diego (1981) 453

Page

U.S. 490 [69 L.Ed.3d 800, 101 S.Ct. 2882] 47

Morris v. Municipal Court (1982) 32 Cal.3d 553 [186 Cal.Rptr. 484] 31

People v. Walnut Properties, Inc. et al., L.A. Super.Ct.No. CR A16848 4

Pringle v. City of Covina (1981) 155 Cal. App.3d 151 [171 Cal.Rptr. 251] 5, 6, 9-12, 14-28, 31, 33-37, 41-46, 48, 52, 53, . 55-57

Pruneyard Shopping Center v. Robins (1980) 447 U.S. 74 [64 L.Ed.2d 74, 100 S.Ct. 2035] 38-41

Strand Property Corp. v. Municipal Court (1983) 148 Cal.App.3d 882 [200 Cal.Rptr. 47] 10

Walnut Properties, Inc. v. Long Beach City Council (1980) 100 Cal.App.3d 1018 [161 Cal.Rptr. 411] 4

Young v. American Mini Theaters, Inc. (1976) 427 U.S. 50 [49 L.Ed.2d 310 96 S.Ct. 2440]

Page

. . i,3, 12, 15-16, 18, 21-28, 30-42, 47, 49-57

Law Reviews

"Developments in the Law--Zoning" 91 *Harv.L. Rev.* at 1562 (1978) 10, 20, 21

Friedman, "Zoning 'Adult' Movies: The Potential Impact of Young v. American Mini Theaters" 28 *Hast.L.J.* 1293 (1977) . 37

Marcus, "Zoning Obscenity: or the Moral Politics of Porn" 27 *Buffalo L.Rev.* 1 (1978) 21, 47

Powell, "The Relationship Between Property Rights and Civil Rights" 15 *Hast.L.J.* 135 (1963) 39

Publications

Los Angeles City Planning Department "Study of the Effect of the Concentration of Adult Entertainment Establishments in the City of Los Angeles" (1977) 10

Los Angeles County Planning Department "Adult Entertainment Study and the Proposed Zoning Ordinance Amendment" (1978) . 10

No. .. ..

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

State of California,

Petitioner,

vs.

Walnut Properties, Inc.

and Vincent Miranda

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE APPELLATE DEPARTMENT

OF THE SUPERIOR COURT,

LOS ANGELES, CALIFORNIA.

Petitioner, the office of the Prosecutor for Long Beach, California, representing the People of the State of California, prays that a Writ of Certiorari issue to review the judgment of the Appellate Department of the Superior Court for Los Angeles County, California, entered in the above-entitled case on April 18, 1985.

OPINION BELOW

The judgment of the Appellate Department of

the Superior Court for Los Angeles, California, unpublished below, was rendered on March 18, 1985, and is appended herewith as Appendix A.

JURISDICTION

The judgment and opinion of the Appellate Department of the Superior Court of Los Angeles, California, was rendered March 18, 1985. Our timely petition for rehearing and/or certification to higher California Courts (Rule 63, California Rules of Court) was denied on April 18, 1985. * The instant petition for certiorari was filed within 90 days of the latter date.

The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257 (3).

---

* Our instant petition is a revised version of the original version which was incorrectly typed; the Clerk has assured us the instant retyped version is still timely because our original was timely filed.

STATEMENT OF CASE

This case presents novel issues, especially the partial-porn "preponderance of use" standard for defining "adult" movie theaters, not raised in this Court's recent grant of certiorari in 84-1360, *City of Renton v. Playtime Theaters, Inc.*.

In 1977 the city of Long Beach, California passed a Detroit-type noncluster "adult entertainment" ordinance similar to the one ruled valid in *Young v. American Mini Theaters, Inc.*. Respondents Vincent Miranda and his wholly-owned corporation, Walnut Properties, Inc. a California corporation, owners of the Lakewood Theater located in the City of Long Beach, thereafter renovated the Lakewood Theater, changing its movie exhibition format to 100% "adult" films at both of the theater's two interior screens. The Lakewood Theater, so denominated and depicted as to its exterior building actually contains two (2) separate interior movie theaters separated by a

permanent structural wall separating the respective screens and seating areas.

We successfully prosecuted both Respondents jointly for violation of the locational zoning restrictions (500 feet from residential zone; 1000 feet from public school) in *People v. Walnut Properties, Inc. et al.*, Los Angeles Superior Court No. CR A16848. A jury trial conviction was affirmed after awaiting Respondents' independent First Amendment attack upon our instant porn-zoning ordinance in *Walnut Properties, Inc. v. Long Beach City Council* (1980) 100 Cal.App.3d 1018 [161 Cal.Rptr. 411]. Our instant ordinance is printed therein *in toto* at 100 Cal.App.3d 1025-1027 [161 Cal.Rptr. at 415-417].

At sentencing on the Long Beach Municipal Court conviction defendants Miranda and his corporation were placed on summary probation for 3 years upon conditions, one of which stated: "not operate Lakewood Theater as an adult theater."

Other constitutional attacks by Respondents upon our Detroit-type adult entertainment ordinance were defeated in both state and federal courts, *e.g. Miranda v. Pitchess*, U.S.Dist.Ct.No. 81-0548, *sum.rev'd* 9th Cir. No. 83-5740, federal habeas again denied below, 81-0548, *app'l pend.* 9th Cir. No. 84-5685; *Miranda et al v. Winston*, U.S.Dist.Ct.No. 83-1665 KN (MCX)--a federal attack upon the state trial judge; *Miranda v. Ussery. et al.*, Los Angeles Superior Court No. C369631, preliminary injunction granted, *app'l pend.* state Court of Appeal Nos. 2d Civ.B005781 and B006024; *Walnut Properties, Inc. v. City of Long Beach*, U.S.Dist.Ct.No. 81-942-TJH, *aff'd* 9th Cir. No. 81-5732; *Crawford, et al v. Municipal Court*, Los Angeles Superior Court No. C391086, *app'l; dism'd* 2d Civ. 67250.

When in 1981 the novel First Amendment interpretation of "preponderant use" was created in *Pringle v. City of Covina* (1981) 115 Cal.App.3d 151, 161-162 [171 Cal.Rptr. 251,

256-257], Respondents began "partial porn" exhibition at both interior Lakewood Theater screens. This "partial porn" exhibition at both screens consisted of constant hardcore ("XXX rated") pornography throughout Friday, Saturday, and Sunday each week. The other 4 days per week exhibited non-porn, general release films at both interior screens.

We deemed the foregoing exhibition schedule to be a violation of the probation condition not to "operate the Lakewood Theater as an adult theater", and proceeded against Respondents for violation of their probation entered in the original Long Beach criminal conviction.

Respondents again sucessfully delayed the revocation of probation (*Morrissey*) hearing by winning a peremptroy writ commanding the trial court to apply *Pringle*, *supra*, at that revocation hearing, *Miranda et al v. Municipal Court*, Los Angeles Superior Court No. C370250, which we eventually reversed in the state Court

of Appeal, 2d Civ.65108. All the foregoing cases were unpublished except *Walnut Properties, Inc. v. Long Beach City Council, supra.*

Appellate delays (from 1978 to 1983) aside, we held the probation revocation hearing September 22, 1983, before the Honorable Kirk Gustafson, an "imported" municipal court judge who was temporarily transferred to Long Beach after all 8 Long Beach municipal judges recused themselves from sitting on this case.

At the evidentiary hearing the following stipulations were reached:

> (1) That the movies represented in People's Exhibit #1, the 271-page surveillance report of the movies exhibited at the Lakewood Theater (generally from May 8, 1981 to March 4, 1983), violated the "preponderant" exhibition of "specified sexual activities" and/or "specified anatomical areas" of our instant zoning ordinance.
>
> Reporter's Transcript ("R.T.") 11:4-12.
>
> (2) That the "adult" movies were shown on consecutive 3-day weekends throughout most of the nearly 2-year period of surveillance.
>
> R.T. 11:13-18.
>
> (3) That the exhibition pattern at the theater changed for approximately 2

weeks in June-July, 1981, wherein 3-day weekend adult exhibition changed to a 7-day weekly schedule of alternate adult, non-adult film exhibition at the theater.

R.T. 11:19-26.

(4) That "recently" (per the record of September 22, 1983) the adult/non-adult film exhibition schedule was altered to show 100% adult films in one of the 2 interior screens while simultaneously exhibiting non-adult, longer running films in the other interior screen at the Lakewood Theater.

R.T. 11:27-12:5.

(5) That the total adult film exhibition time never exceeded the non-adult film exhibition time of both interior screens at the theater.

R.T. 12:6-10.

Continued surveillance of the theater *since* the 1983 hearing reveals that the "half-theater, 100% porn" exhibition schedule continues unabated, and that exact headcounts of movie patrons at both interior screens reveal the non-porn "half-theater" to be virtually empty while simultaneously the 100% porn "half-theater" is packed with patrons. On one occasion the non-porn movie was malfunctioning for hours (off screen and unviewable), but continued to run because no one was present to complain, anyway.

From the foregoing undisputed facts it is

clear that the Lakewood Theater has reverted to its former, illegal, 100% porn land use, but that by virtue of its two-screen configuration and the *Pringle imprimatur* of "preponderant use" it continues to flout our zoning ordinance.

Two-screen interior theaters are common nowadays throughout the United States. Indeed, typical shopping malls often are constructed with 4- and 6-screen theaters under one exterior structure.

There are no factual problems with "public accessibility" to porn in Long Beach because numerous other 100% porn theaters existing *before* 1977 Long Beach ordinance are "grandfathered" exceptions to the ordinance. (Indeed, "accessibility" abounds, anyway, since *Pringle's* "preponderant use" standard allows *every* movie theater--there are 14 in Long Beach--to be "certified clean" from "adult" regulation so long as it shows hardcore porn only 49% of the time.)

Nor do we confront your No. 84-1360 *City of*

Renton problem of "adopting" other cities legislative findings. California expressly allows such "adoption". *Strand Property Corp. v. Municipal Court* (1983) 148 Cal.App.3d 882, 887 [200 Cal.Rptr. 47, 49]. Moreover, our instant record of the *Morrissey* hearing below contained exhaustive undisputed information (15 People's Exhibits) regarding original City Council legislation, public hearing thereon, and the Los Angeles City planning Department Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles, City Plan Case No. 26,475, as well as its Los Angeles County counterpart, "Adult Entertainment Study and Proposed Zoning Ordinance Amendment (1978). *Cf.* "Developments in the Law--Zoning," 91 *Harv.L.Rev.* at 1562-1563 nn.80-87 (1978). The Los Angeles land use planning studies, *supra*, were relevant to the formulation of our Long Beach porn-zoning ordinance in 1977. *Cf.* Motion to Augment record on Appeal in the instant superior court below, Exhibits #1-#15.

The Long Beach trial court below refused our offer to vitiate *Pringle* by altering the First Amendment "preponderant use" definition to that of "single instance of use" (rejected and erroneously conceded by municipal counsel in *Pringle*). Based squarely upon stipulation #5 (total porn exhibition did not "preponderate" over non-porn film exhibition), the trial court ruled itself bound by *Pringle* "preponderance", and found Respondents *not* in violation of probation because they at no time exhibited a sufficient quantity of adult films to be deemed an "adult" theater per our ordinance.

We filed timely appeal to the Appellate Department of the Superior Court for Los Angeles County (the only appellate forum possible), which rendered its opinion on March 18, 1985. A correct copy of that Opinion is appended herewith as Appendix A. It held simply that *stare decisis* required its obedience to the *Pringle* (a higher appellate court) "preponderant use" standard. It, therefore, affirmed the denial of probation violation

basing its decision squarely upon stipulation #5 below, exactly as the trial court had done. Our petition for rehearing and/or certification to the California Court of Appeal was denied April 18, 1985. A correct copy of that order is appended herewith as Appendix B.

The facts have never been in dispute herein; the dispute is solely *Pringle's* First Amendment interpretation requiring a "preponderant use" of porn exhibition before any theater may be constitutionally deemed an "adult" theater.

Incidentally, we are *not* concerned herein with *Pringle's* other constitutionalizing First Amendment definition *re* "distinguished or characterized by an emphasis" 115 Cal.App.3d at 160 [171 Cal.Rptr. at 255] (as opposed to "used which solely concerns us herein). Ironically, it was the former ("characterized", *etc.*), not the "used" language which this court thought susceptible of constitutionalizing state construction in *Young v. American Mini Theaters, Inc.*. Stipulation #1 (admitting preponderantly adult characterization of the

adult films exhibited) precludes anyone from raising alleged vagueness with respect to the "characterized" *etc.* language herein.

REASONS FOR GRANTING THE WRIT

I

PRINGLE"S "PREPONDERANT USE" STANDARD OF FIRST AMENDMENT CONSTRUCTION DESTROYS ALL ASPECTS OF PORN-ZONING (IN BOTH ITS CLUSTER--BOSTON--AND NONCLUSTER--DETROIT--VARIATIONS) IN VITIATION OF THIS COURT'S *YOUNG IMPRIMATUR* FOR MUNICIPAL "EXPERIMENTATION" IN PORN-ZONING

It's difficult to "experiment" with content-based porn-zoning when the states are free to construe the entire concept of porn-zoning out of existence by creating a fluctuating or sliding-scale standard of "use", violation occurring *only* after the 50th percentile of porn "use" is exceeded by film exhibitors who are free to choose exactly what type of films to exhibit and exactly how often.

This 50th percentile ("preponderance") standard of use before a movie theater (or bookstore: *Kuhns v. Board of Supervisors* (1982)

128 Cal.App.3d. 369, 376, [181 Cal.Rptr. 1, 4]), becomes "adult" for locational zoning purposes has the following practical effects: (1) converts *all* movie theaters into quasi-adult, sliding-scale vagueness porn-theaters depending on the number of repetitions a porn movie is exhibited, not becoming an "adult" theater until the magic number (which itself varies) is exceeded; (2) "deconverts" all purely porn theaters into non-adult so long as the magic number of porn films exhibitions is not exceeded; (3) destroys all practical enforcement of porn-zoning because the inherent vagueness 50th percentile has no time period for measurement, thus allowing a valid defense of: "tomorrow we intended to exhibit non-porn and for X number of days thereafter, reducing our last days' (fortnights', weeks', months', years') total porn exhibition below the 50% level--you simply enforced us too soon!"; (4) destroys practical enforcement because of the administrative difficulties with *Pringle's* newly-required

total and constant surveillance of all movies, books, magazines, *etc.* dispensed/rented/sold for commercial gain with exact chronological histories of each specific sales/rental location and the kinds and quanities of literature sold/rented on a daily basis; (5) the foregoing--imposed for the first time by *Pringle's* fluctuating "preponderant use" standard--would convert California municipalities into Orwellian "Big Brothers", contrary to municipal desires, in order to obtain sufficient information to determine if a location had slipped past the 50th percentile and thus into the "adult" category; (6) destroys the traditional concept of zoning, which has always been based upon the daily use of the land, each day's nonconforming use being actionable; (7) overrules this Court's *Young v. American Mini Theaters* decision, which correctly assumed each day's use to be a violation of the ordinanace; and (8) erroneously construes a clear, unique, unambiguous statutory word ("used") so as to

render it unenforceably vague in all the foregoing ways (and more: how about counting the porn *titles exhibited*, rather than actual screening time, allowing "preponderance" to be exceeded only when the number of porn films--not their length--exceeds the number of non-porn films at the theater? or, counting the *cash receipts* at each theater/bookstore, exceeding "preponderance" whenever the monetary gross receipts for porn exceeds that for non-porn movies at the theater). We admit the last two examples bespeak little governmental interest because the former (counting titles) allows easy circumvention by simply showing a *greater number* of shorter non-porn films, *e.g.* cartoons--imagine the impact on children! --whereas the latter (cash receipts) seems to assert a governmental interest in restricting economic income foreign to basic democratic principles of free economy.

When this Court correctly granted its *imprimatur* to the concept of content-based porn-zoning in *Young v. American Mini*

Theaters, Inc. (1976) 427 U.S. 50 [49 L.Ed.2d 310, 96 S.Ct. 2440], it did so with the express understanding that despite some vagueness of the statutory language "distinguished or characterized by an emphasis" (not at all our instant statutory language: "used for presenting") it was capable of state construction in the ongoing "experimentation" of municipalities country-wide:

> "It is not our function to appraise the wisdom of its decision to require adult theaters to be separated [Detroit] rather than concentrated [Boston] in the same areas. In either event, the *city's interest* in attempting to preserve the quality of urban life is one that *must be accorded high respect;* moreover, the *city must be allowed a reasonable opportunity to experiment* with solutions to admittedly serious problems."
>
> 427 U.S. at 71, emphasis added.

Pringle, supra, has destroyed all municipal "experimentation" in porn-zoning by decapitating the very concept of porn-zoning itself.

There will be little "experimentation" with porn-zoning in California in its present toothless, *Pringlized* vagueness simply because

the "high respect" *Young* (*id.*) guaranteed to municipal interests has been exchanged for blanket porn covering all California cities. A 49% porn blanket covering all commercial literature sales/rental locations statewide is a blanket no matter how thin its weave.

It is clear, therefore, that *Pringle* has refused to accord the "high respect" demanded by *Young*, *supra*, in derogation of the municipal power to zone commercial land uses. It is this failure correctly to draw the constitutional line between First Amendment commercial expression and the police power right to zone which lies at the heart of *Pringle's* error:

> "We next consider the meaning of the word 'used' in the Covina ordinance's definition of an adult theatre as a building 'used for presenting' sexually explicit material [Long Beach is the same--so was Detroit, *Young*, *supra*, 427 U.S. at 53 n. 5]. The ambiguity lies in the ordinance's failure to indicate what proportion of a theatre's programming would constitute 'use'.
> . . . In the [Covina] trial court, defendant [city] responded to plaintiffs' vagueness attack by claiming that *a single exhibition* of any one adult film constituted a 'use' in violation of the ordiance. But such an interpretation would necessarily render

> this ordinance constitutionally invalid. [Query?]
>
> . . . A zoning regulation based on a '*single isolated instance of use*' would fail this test. [Query?] It could not be justified by the city's interest in preserving the character of its neighborhoods. [Citation.] While defendant certainly has an important and substantial interest in maintaining the stability of its neighborhoods, we cannot conclude that defendant could reasonably have determined [note this was a factual conclusion without the benefit of any evidence whatever] that *a single showing of a sexually explicit film* produces adverse 'secondary effect[s]' destructive of the general quality of life in the neighborhood. [Citation.] Indeed, we would have to conclude [a conclusion in a factual vacuum] that 'the ordinance was not rationally tailored to support its asserted purpose' [citation] as a necessary zoning regulation to prevent neighborhood blight but was instead a 'misconceived attempt directly to regulate content of expression' by 'using the power to zone as a pretext for suppressing expression' [citation]."
>
> 115 Cal.App.3d at 161-162 [171 Cal.Rptr. 256-257], emphasis added.

Thereafter follows *Pringle's* "stroll through the dictionaries" (Webster's, Black's, *et al.*) wherein the statutory word "used" is transmuted into "usually", thence to "ordinarily", and finally to "preponderance."

Dictionaries are valuable tools, but they hardly substitute for analysis of the respective constitutional interests of the parties, none of which was done in *Pringle*.

Nor did *Pringle* deign to consider the fact that partial porn "preponderance" spelled the end of porn-zoning as a viable concept. Zoning has always depended upon 100% regulation of the land use, each day's nonconforming use requiring a "variance" or conditional use permit. *Cf.* "Developments in the Law--Zoning, *supra*, 91 *Harv.L.Rev.* at 1439-1440.

The whole structure of zoning presupposes conformity to preset, locational standards (restictions) thereby developing homogeneity inside specifically differentiated municipal areas. Zoning is effectively a "prior restraint upon land use" in various but well defined areas of the city. The "prior restraints" are specifically defined and democratically determined.

> "At the time of *Euclid*, a basic premise of zoning was [and remains] that land use in a neighborhood should be

homogeneous."

"Developments . . .", *supra*, 91 *Harv.L.Rev.* at 1450.

Of course, this "prior restraint" upon land use with its successful 70-year history of methodology of dealing with interproperty private disputes [*id.* at 1427; *cf.* Marcus, "Zoning Obscenity: or the Moral Politics of Porn," 27 *Buffalo L.Rev.* 1, 30 (1978)] conflicts with *pure* First Amendment classical speech, which correctly in a democracy protects the disruptive, nonhomogeneous expressive rights of persons. But *Young* has settled that basic conflict.

Young correctly determined that so long as expression were infringed only peripherally (solely in commercial aspects, and regulating merely location thereof) porn-zoning was a valid municipal tool despite its basis in the *content* of the expression ("adult").

Pringle, unwittingly we presume, decapitated the very concept of porn-zoning by its express rejection of the "single instance of use" --the very basis of structural homogeneity upon which

zoning is founded. *Pringle's* replacement of "single instance of use", the traditional zoning standard, with incremental "preponderant use", a factually unfeasible standard of enforcement, cannot be allowed to destroy California's "experimentation" with porn-zoning by destroying the very concept in erroneous construction of the Federal First Amendment. Indeed, as we shall emphasize in Point II, *infra*, *certiorari* must be granted herein so that *even state constitutions* be not allowed to destroy municipal experimentation in porn-zoning.

Pringle is wrong not only because it misconstrued the federal First Amendment, but more importantly because even if it were based upon "independent state grounds" (and it clearly was not) it *still would* have to be destroyed so that *Young*-mandated municipal "experimentation" may exist. Cf. 115 Cal.App.3d at 158 n.5 [171 Cal.Rptr. at 254 n.5]. Federalism cannot be allowed to destroy the independant municipal right (police power) to zone local porn.

II

WHERE AS HEREIN THE *PRINGLE*-MANDATED STATE PORN-ZONING STANDARD DESTROYS THE ESSENCE OF PORN-ZONING BY INITIATING A REQUIREMENT OF FLUCTUATING "PREPONDERANT USE", AND WHERE THE MOVIE THEATER HAS IN FACT REVERTED TO 100% PORN EXHIBITION AT ONE OF ITS TWO (2) INTERIOR MOVIE SCREENS, THAT STANDARD MUST BOW TO *YOUNG'S* AUTHORIZATION OF MUNICIPAL RIGHTS EVEN IF THAT STATE STANDARD BE BASED UPON "INDEPENDENT STATE GROUNDS"

Our instant case is factually well designed to reaffirm this Court's *Young* principles against California destruction of *Young* by novel invocation of a "narrowing construction" in the partial porn exhibition context because our instant theater is *in fact* operating as if it were a 100% porn theater.

As stipulations #2 thru #4 below established (pp. 7-8, *infra*) Respondents have altered their percentage of porn film exhibition at least 3 times--is this an admission that even the theater owners do not understand the vagueness

of *Pringle*-imposed "preponderant use"?

Importantly, stipulation #4 (*id.*) continues unabated to the present. The Lakewood Theater has for the last 21 months been operating as a *de facto* 100% porn theater at one of its two interior screens. And this is a theater renown in the neighborhood (indeed, in the entire city) for its local history of 100% porn at both interior screens. This latter fact, of course, led to instant criminal conviction (before *Pringle* entered the picture in 1981).

Pringle precludes our *Young*-zoning of this *de facto* 100% porn theater because it uses its other interior screen to exhibit simultaneous longer-running non-porn films--a stratagem obviously designed to avoid instant porn-zoning. Yet there is nothing municipally available to halt this blatant sham by Miranda, *et al.*, world-renown owners of one of the world's largest porn theater chains--the Pussycat theaters.

We have attempted in vain below to remedy *Pringle's* novel revolution upon *Young*, which

did not itself reach the issue of partial-porn exhibition. The time is now come to address *Young* in the partial-porn context. And that must involve total vitiation of *Pringle's* fluctuating standard of "preponderant use".

And it must vitiate *Pringle's* "preponderant use" standard EVEN IF that standard be established by "independent state grounds". *Pringle* never addressed the latter issue, *i.e.* federal vs. state basis for its porn-zoning standards. But *cf.* 115 Cal.App.3d at 148 n. 5 [171 Cal.Rptr. at 254 n. 5]. We have no doubt that the current animosity existing between "liberal" California appellate courts and this Court (animosity generated by perceived "liberal" state justices and an admittedly "conservative" governor, whose personally drafted voter initiative,

"Victims Bill of Rights", passed June 8, 1982 by the electorate, legally stripped state appellate courts of all "independent state grounds" in search/seizure cases, thereby forcing state decision to conform to this

Court, cf. *In re Lance W.* (1985) 37 Cal.3d 873 [210 Cal.Rptr. 631, 694 P.2d 744]) will eventually assert itself to insulate *Pringle* "preponderance" from federal review. "Independent state grounds" is yet viable in California for First Amendment questions. It is merely a question of time before "independent state grounds" severs *Young* totally in the partial-porn context to destroy all possibility of municipal porn-zoning. And this is no wise limited to California, which we recited merely for its recent wounding of the state judiciary.

Municipal rights to porn-zoning must be protected by this Court, EVEN AGAINST STATE ENCROACHMENTS, if those encroachments be of the *Pringle* kind, which *destroy* the very concept of porn-zoning. Otherwise, of course, state participation in porn-zoning "experimentation" is quite proper, indeed, invited by *Young* itself.

Pringle is the kind of *Young*-destroying state interference which local municipalities

(especially charter cities, such as Long Beach, exercising "home rule" provisions of the state constitution and existing independent of state authority, *cf.* Point III, *infra*) cannot tolerate in their inherent police power (zoning) authority. *Pringle* is disastrously wrong for its gratuitous "narrowing" (actually "broadening" of the traditional "single instance of use" zoning standard) of the "used for exhibiting" statutory language. We say "gratuitous" because this "narrowing" was *not* invited by *Young's* 100% porn exhibition, and cannot apply to our instant *de facto* 100% porn exhibition at Respondent's Lakewood Theater. *Cf.* Point IV, *infra*.

Although not contained in the instant state record (for obvious reasons) the fact is that since the September, 1983 hearing below, the "other" (non-porn) interior screen of the Lakewood Theater has had approximately 2 customers/patrons, occasionally misexhibits the non-porn movie physically off-screen, and selects as non-porn (longer-running than the

100% porn movies next door) black-and-white films from the 1930's and 1940's, movies which have zero box-office appeal.

We do not fault theater management for its selection of non-porn movie fare (the First Amendment clearly protects them in those selection decisions); but we note the obvious effort to minimize non-porn exhibition costs by selecting "cheap", unpopular non-porn movies merely to perpetuate the *Pringle* charade of being other than a 100% porn theater.

Our instant theater is *de facto* a 100% porn theater (exactly as it began in 1977). Therefore, *Pringle* ought to be irrelevant herein, contrary to our instant appellate decision requiring state adherence to *Pringle's* arbitary and unreasonable fluctuating "preponderance" of use standard. Unless this Court grants hearing herein California will continue to preclude porn-zoning via the spreading infection of *Pringle's* misconstruction of *Young*, a misconstruction to blossom into independent state grounds, thus

removing the issue from correction by this Court.

III

THE STATE CONSTITUTION ALLOWS "CHARTER" CITIES, SUCH AS LONG BEACH, PLENARY POLICE POWER CONTROL OF "LOCAL AFFAIRS" SUCH AS PORN-ZONING, YET *PRINGLE'S* ERRONEOUS "PREPONDERANT USE" STANDARD TRIGGERS STATE PREEMPTION OF THE FEDERAL CONCEPT OF PORN-ZONING AND INVITES FURTHER STATE INCURSION BY PREEMPTING ALL SEX-RELATED DEPICTION IN GENERAL

As do many states California constitutionally allows "home rule" over local affairs for charter cities, *i.e.* cities organized pursuant to their independent charter provisions and not "general law cities" (*cf. Coffineau v. Fong Eu* (1977) 68 Cal.App.3d 138 [137 Cal.Rptr. 90]).

> "It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall

> be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith."
>
> Cal. *Constitution*, Art.XI, §5 (a).

Zoning is a classic example of local or "municipal affairs" for charter cities. Long Beach is an independent "charter city." One would expect, therefore, that porn-zoning, a local municipal affair, would be accorded plenary local control without state "preemptive" interference.

And this expectation is enhanced by the federal (*Young*) basis for the very concept of porn-zoning. *Young's* exemption of First Amendment "preemption" for municipal porn-zoning ought not to be vitiated by unwarranted state interference. This is so particularly where state interference be wrong-headed and unwittingly destructive of that fundamental concept, and where that interference be mistakenly thought to have been invited by this Court. The latter mistake is traced *infra*, Point IV.

Here we note only the federal creation (*Young*) of the municipal right to porn-zoning cannot be allowed a *Pringle* demise in ostensible (erroneous) construction of *Young re* local language ("used") which was not in issue before *Young* AND WHICH IS NOT IN ISSUE INSTANTLY IN OUR *DE FACTO* 100% PORN CONTEXT. Whatever the merits (demerits) of *Pringle* it cannot apply herein to defeat *Young's* clear mandate.

Sexual activity has never been construed by California courts--except when forced by federal preemption, *e.g.* the Twenty-first Amendment, *cf. California v. LaRue* (1972) 409 U.S. 109 [34 L.Ed.2d 390, 93 S.Ct. 390], to be a "municipal affair." The result has been incessant state preemption of municipal regulation of the criminal aspects of sexual misconduct, including nude dancing. In *Morris v. Municipal Court* (1982) 32 Cal.3d 533 [186 Cal.Rptr. 494, 652 P.2d 51] the state supreme court limited *LaRue* to its facts, extending state "preemption" to preclude local

regulation, and relying expressly upon *state* free speech provisions. 32 Cal.3d at 563 n. 10 [186 Cal.Rprt. at 500 n. 10].

What are municipalities to do? State courts erroneously misconstrue this Court's *Young* decision (a municipal rights case), and if charter municipalities don't like it, state courts preempt the field either expressly or by construction of state free speech provisions.

What we need is a definitive decision articulating the line between impermissible state interference with independent charter municipalities which rely upon federal porn-zoning concepts. Federalism be protected, but not at the cost of denying municipalities their *inherent* police power right to zone porn. *Young* cannot create municipal exemption from federal free speech only to have it destroyed by easy state application of state free speech provisions. *Young* cannot be helpless to protect what it has correctly created.

We should presume the instant state

appellate decision to be *Pringle* progeny of *state* origin. If *certiorari* be granted herein, this Court will miraculously see the instant decision clothe itself with plenary state grounds. Let us, therefore, presume them initially to decide the correct point at which *state* free speech/preemption is precluded against charter municipal zoning of local porn.

IV

YOUNG NEVER INVITED STATE "NARROWING CONSTRUCTION" OF THE STATUTORY PHRASE "USED"

Pringle divides itself neatly into two halves: (1) narrowing construction of the ordinance phrase "distinguished or characterized by an emphasis" (115 Cal.App.3d at 159, 171 Cal.Rptr. at 255), and (2) "narrowing" (actually "broadening", because *Young* was at its narrowest--a single instance of use) construction of the ordinance phrase "used for presenting" (115 Cal.App.3d at 161 [171 Cal.Rptr. at 256]). We call these entirely separate state constructions of the

Young ordinance respectively *Pringle* (1) and *Pringle* (2).

It is clear that *Young* itself did *not* invite a narrowing construction of the issue singularly confronting us herein, *i.e.*, *Pringle* (2) "used for presenting." *Young* at most suggested state correcting of possibly vague *Pringle* (1) "distinguished or characterized by an emphasis."

But *Pringle* (1) cannot concern us herein because of Respondent's stipulation #1, *infra* p.7, which fully admitted the "adult" nature of the movies (including *Pringle* (1) "preponderance of emphasis") exhibited at the Lakewood Theater.

We suggest *Pringle* (1) to be incorrect "narrowing" which rhetorically expresses majoritarian "preponderance" by tipping its hat to democratic voting and legislative analogies, but which fails to analyze any of the constitutional interests of the parties in the traditional First Amendment context. In any event we need not (and hereinbelow did not)

reach the issue of *Pringle (1)*.

Our limited concern herein is the disaster of *Pringle (2)*, the totally unnecessary "narrowing" definition of "used for presenting."

Justice Powell, concurring in *Young, supra*, made it clear that the zoned adult theaters in Detroit would "not be able to exhibit adult movies [not even once] at its present location." 427 U.S. at 77. This clearly (and correctly) assumed the traditional zoning standard: "single instance" of nonconforming land use.

The *Young* plurality invited "narrowing" state construction solely for *Pringle (1)* (irrelevant herein) "characterized by an emphasis":

> "As already noted, the *only vagueness* in the ordinance relates to the amount of sexually explicit activity that may be portrayed before the material can be said to be 'characterized by an emphasis' on such matter. For most films the question will be readily answerable; to the extent that doubt exists, we see no reason why the ordinances are not 'readily subject to a narrowing construction by the state

courts.'"

427 U.S. at 61, emphasis added.

The "only vagueness" *Young* could find in the ordinances was *Pringle (1)*, which we think was also erroneous, in articulating democratized "preponderant characterization" (again without analyzing pertinent First Amendment interests). BUT WE ARE NOT TROUBLED HEREIN WITH THE MORE DIFFICULT *PRINGLE (1)* PROPOSITION. We concern ourselves herein solely with *Pringle (2)*.

Pringle mistakenly assumed this Court's *Young* invitation for "narrowing construction" applied to *Pringle (2)* as well as *Pringle (1)* as is discernible from the case heading preceding discussion of *both Pringle (1)* and *Pringle (2)*: "The Ordinance Must Be Narrowly Construed" 115 Cal.App.3d at 157 [171 Cal.Rptr. at 254].

Justice Powell expressly noted that the Detroit theater (Nortown) would not be able to exhibit (even one instance) of porn at that 100% porn theater:

> "Nortown concededly will not be able to exhibit [any--not even a single instance] adult movies at its present location."
>
> *Young*, *supra* 427 U.S. at 77.

This "single instance" traditional zoning rule was correctly the original construction of our instant Detroit-type porn-zoning ordinance:

> "The wording of the Detroit ordinance [of which ours is nearly verbatim identical] seems to indicate that *any time an 'adult' film is shown* the building in which it is exhibited *becomes an 'adult' theater.*"
>
> Friedman, Zoning 'Adult' Movies: The Potential Impact of Young v. American Mini Theaters," 28 *Hast.L.J.* 1293, 1301 (1977), emphasis added.

Yet what did *Pringle* (2) do to that zoning standard, the single instance of use? It destroyed it by its novel, vague, and unworkable "preponderant use" standard.

What is needed is a clear reversal of *Pringle* (2), the fluctuating "preponderant use" test for defining a theater "used for presenting" porn movies. This reversal is necessary not merely to correct California's unwitting decapitation of the entire *Young*

concept of porn-zoning, but it is necessary to protect *all U.S. Municipalities* from destructive intervention by states (even by independent state grounds) so as to destroy the very concept of porn-zoning itself.

It is about time that states be curtailed in their preemption of municipally inherent, federally recognized local police power to zone land uses and regulate local businesses. Here local municipal interests are greater and commercial theater First Amendment (and state equivalents) much less compelling than in *Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74, where the petitioners were themselves *engaged* in their own speech (as opposed herein to merely commercially exploiting others' speech) and where landowners opposed free speech solely by virtue of individual ownership of the land. *Pruneyard's* allowing state free speech "preemption" of the federal First Amendment cannot pertain herein because municipal interest in zoning actually asserts the *same* interest as did speech activists in

Pruneyard.

California's *Pruneyard* relied heavily upon Powell, "The Relationship Between Property Rights and Civil Rights," 15 *Hast.L.J.* 135 (1963): "Property rights must yield to the public interest served by zoning laws . . . ." 23 Cal.3d at 906 [153 Cal.Rtpr. at 857, 592 P.2d 341] in "overruling" by independent state grounds this Court's *Lloyd Corp. v. Tanner* (1972) 407 U.S. 551.

There is no federal conceptual "private ownership" here to oppose others' speech activities because (1) *Young* has correctly federally regulated commercial locational profit from others' speech when balanced against municipal need, (2) porn involves purely commercial exploitation of others' speech, not free speech itself, (3) California's subordination of property rights to actual free speech would side with municipal regulation of commercial business uses of property where actual free speech itself is not involved, (4) therefore, California and *Young*

are at one in according municipal regulation of commercial zoning higher priority than business exploitation of others' speech. Indeed, *Young* can be seen as a shift of this Court from *Lloyd Corp.* toward *Pruneyard.* As *Young* correctly realized, without the ability of a municipality to zone its future, it cannot control its future, hence cannot control its continued existence. Zoning (including porn-zoning) is absolute life or death for cities. It involves more than mere "high respect" for "admittedly serious problems". 427 U.S. at 71.

Instantly the interest "opposing speech" is the municipal zoning power, an inherent municipal right, but it is not "opposing speech" at all. Rather it is regulating locationally solely the commercial exploitation of others' speech. And commercial regulation, like zoning, has always been traditonal grist for the municipal mill.

The twin traditional interests of local zoning and commercial regulation represented by the municipality cannot be opposed by

legitimate free speech (state or federal) because actual free speech is not involved herein.

And because *Pruneyard's* substantial interest opposing speech", *i.e.* individual private ownership is likewise absent herein, this Court's *Pruneyard* must balance *for* the municipality, not against it. Therefore, a federal *Pruneyard* assessment of local municipal interests when balanced upon federal due process against "independent" state free speech (commercially exploited speech) must likewise balance in favor of the municipality and against state "free speech" interests in this context.

This is not wholesale violation of federalism. Rather, it is correct due process federal protection of municipal rights against independent state destruction thereof. Nor is it self vitiation of *Young's* invitation to state narrowing of *Pringle (1)*. *Pringle (1)* cannot concern us herein.

Nor does federal reversal of "independent

state *Pringle (2)*" and preclusion of *that kind* of destructive interference with municipal (especially "charter" municipal) experimentation in porn-zoning vitiate that "experimentation". The "experimentation" with porn-zoning approved in *Young* (427 U.S. at 71) was "city", not state, experimentation:

> "Moreover, the *city* must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems."
>
> Emphasis added.

Certiorari must be granted herein that destructive, unreasonable state interference (even independent state constitutional interference) not be allowed to demolish municipal experimentation in porn-zoning.

V

THE PARAMETERS OF FEDERAL DUE PROCESS PROTECTION OF MUNICIPAL PORN-ZONING NEED NOT BE BROAD IN ORDER TO REVERSE PRINGLE (2) ON OUR INSTANT FACTS

We need not implicate nor articulate broad principles circumscribing independent state interference with municipal porn-zoning in

order to reverse *Pringle* (2) herein. We need only decide the following:

> (1) Where the partial porn theater has history of 100% porn;
> (2) Where it has now reverted to 100% porn despite its observance of the "letter" of *Pringle* (2) by exhibiting "cheap" non-porn films at an adjacent interior screen, thus reviving 100% "deleterious secondary effects" begun earlier;
> (3) Where the state interference in porn-zoning is so great and so destructive as to destroy the feasibility of porn-zoning as a viable concept;
> (4) THEN, federal due process can be invoked by the municipality to protect itself from such state interference, even if that interference be based upon "independent state grounds".

It is, therefore, quite possible to declare *Pringle* (2) unconstitutional AS APPLIED herein without unconstitutionalizing it in general. This alternative of AS APPLIED unconstitutionality is the lesser intrusion into state/municipal affairs, and will suffice to reverse the instant application of *Pringle* (2).

Because of the factual uniqueness of (1) and (2) above we need not address herein the question of "percentage" of deleterious

secondary effects caused by "partial" exhibition of porn in general, nor the various possibilities of innumerable variations of "sliding scale" quanta, each theater choosing the *Pringle* (2) amount of porn vs. non-porn to be exhibited therein. *See* Point VI, *infra*.

However, we suggest that the very concept of municipal porn-zoning itself must be protected against cataclysmic state erosion--by any "partial exhibition" standard such as *Pringle* (2) anywhere in this country.

The beauty of declaring *Pringle* (2) facially unconstitutional infringement of municipal rights to porn-zoning and zoning's countywide traditional "single instance" test for violation thereof is its simplicity, feasibility, and fidelity to normal standards for municipal zoning in general. Unless *Pringle's* "variable use" be destroyed conceptually, constitutional acrobatics will need to be done, each federal decision determining its own First Amendment quantum % of porn; this will produce no certainty but

only conceptual confusion.

The flat unconsitutionalizing of *Pringle* (2) and any variation from the "single instance of use" standard will give a "bright line" feasibility for continued existence of the concept of porn-zoning. Otherwise its demise is imminent, ideed, a *fait accompli* for California.

VI

THERE IS NO CONFLICT BETWEEN ZONING'S TRADITIONAL "SINGLE INSTANCE" LAND USE AND FACTUAL *DE MINIMIS* BECAUSE (1) DELETERIOUS SECONDARY EFFECTS ARE PRESUMED EVEN FROM A SINGLE SHOWING, (2) ZONING REQUIRES SINGLE INSTANCE IN ORDER TO BE FEASIBLE, AND (3) ALLOWING A "VARIABLE QUANTUM" DEFENSE WILL INUNDATE THIS HIGH-COURT WITH INNUMERABLE APPEALS/WRITS DEMANDING FACTUAL QUANTIFICATION OF THE AMOUNT OF PORN EXHIBITED AND ITS CONSEQUENT NEIGHBORHOOD SECONDARY EFFECTS

Factually this High Court cannot allow the fluctuating camel of *Pringle* (2) to get its

nose inside the tent because express constitutionalization (state or federal free speech) of variable exhibition (*Pringle's* 50+%, or *any other* figure, *e.g.*10%, 1%, 37%) will open the floodgates of constitutional interpretation as applied to every such case litigated in the United States. Each case will inevitably end up before this High Court because each case necessarilty implicates either defendants' federal speech rights, or municipal police power contrary to state speech rights, both of which always present federal questions justiciable before this Court.

The "bright line" of "single instance of use" (traditional zoning standard) is salutary for its clarity.

It is theoretically possible although extremely unlikely that some theater may exhibit porn only once per annum. This would violate our asserted construction of porn-zoning herein. Whether it be prosecuted would depend upon several factors, but that

"single instance" must remain prosecutable lest the miasma of unfeasible "variable constitutionality" be created. *Cf.* Point I, *infra*.

We must presume deleterious secondary effects to the neighborhood "quality of life" from even a single exhibition of porn. *Young* and the 100% porn cases have long established deleterious secondary effects. *Cf.* Marcus, *supra*, 27 *Buffalo L.Rev.* at 8-9 and 15-17 for New York City's disastrously detrimental experience.

We suspect that your recent grant of *certiorari* in No.84-1360 will allow small municipalities to rely upon the factual bases of other cities' planning/zoning studies to establish their own factual desirability for porn zoning ordinances. This "incorporation" of general municipal experience bespeaks progress in land use planning generally. To paraphrase this Court's *Metromedia, Inc. V. San Diego* (1981) 453 U.S. 490 [69 L.Ed.3d 800, 815 101 S.Ct. 2882] with respect to both aesthetics

and traffic safety as independent bases for land use planning and municipal business regulation:

> "Nor can there be substantial doubt that the twin goals that the ordinance seeks to further--traffic safety and the *appearance* of the city--are substantial governmental goals. It is *too late to contend otherwise* with respect to either traffic safety [citation], or *esthetics* [citations]."
>
> Emphasis added.

So also porn-zoning--even in the partial exhibition context. "It is too late to contend otherwise" that partial exhibition of admitted porn (as opposed to exhibition of quasi-porn in the *Pringle* (1) sense, which does not concern use herein) produces deleterious secondary effects upon the neighborhood. There must remain a strong presumption that admitted porn, no matter how often exhibited, produces such undesirable effects.

Defendants would have us believe that the "single exhibition" of porn would be factually *de minimis*, thus incapable of sustaining legislation on that subject. But this misconceives the constitutional problem. The

issue is failing to legislate in areas perhaps *now de minimis*, but which likely will grow to become serious in future. All empirical studies show porn to grow automatically into self-propelling neighborhood blight. *cf. Young*, 427 U.S. at 81 n. 4, Powell concurring. The law is clear that legislation need not await the maturation of substantive evils before acting. Good legislation often "corrects" the evil *before* it occurs:

> "Reasonable anticipation of such problems is itself sufficient to justify the official reaction embodied in [the legislation]."
>
> *County of Sacramento v. Superior Court, etc.* (1982) 137 Cal.App.3d 448, 455 [187 Cal.Rptr. 154, 158-159].

This "anticipatory" legislation cannot be used to ban porn from the city, for that violates zoning (and *Young*) as well. Zoning guarantess the *existence* of porn in the City.

The real constitutional problem is conceptual. The "preferred position" of the First Amendment, with its procedural appendage

"overbreadth", has now become opposed to *Young's imprimatur* of porn-zoning, which explicitly allows zoning based upon speech content. "Overbreadth" efficiently allows review of every possible speech infringement by avoiding all "standing" limitations, assuring review on the merits.

Ordinarily First Amendment overbreadth would destroy all judicial tinkering and local experimentation with content-based legislation in deference to the "preferred" position of free speech/press. But what *Young* did singularly (although necessarily) was destroy the "preferred position" of speech in the narrow municipal zoning context (porn-zoning).

Because speech litigants no longer enjoy the "preferred position" while attacking merely locational speech restrictions (*Young*), they no longer enjoy preferred overbreadth nor preferred presumption of unconstitutionality in that *Young* context. Indeed, presumption normally favors legislation, and does so herein because *Young* expressly vitiated the contrary

presumption in our context.

There is, therefore, every basis for encouraging a presumption of constitutional validity despite the speech basis of our ordinance. Once we understand the temporary or narrow suspension of speech supremacy in our context there is no problem presuming the assured factual injury to neighborhoods from porn exhibition in any amount, even the single instance of use. Again, legislative "anticipation" of neighborhood demise allows legislation even for the single instance case. *Young* did in fact rebut the broad "preferred position" of speech in the zoning locational context. But that fact is largely unknown. We have now only to recognize that fact.

The concept *de minimis non curat lex*, applicable in some areas of the law, has *never* applied to real property situations. A glance at the common law "encroachment" cases (even encroachment of an inch onto another's land) proves it conclusively. And since municipal zoning is purely real property law, it follows

that *de minimis* cannot apply in our *Young* situation, which regulates location of land use for porn exhibition/sale. We have noted independently herein (Point 1, *infra*) the conceptual necessity of "single instance" of land use in the zoning context. Porn-zoning is the same.

Pringle (2)'s error was mistakenly to ignore *Young*'s narrow "repeal" of speech supremacy (indulging incorrectly the wrong presumption of unconstitutionality) and erroneously to assume *de minimis* interdiction of all legislation *re* "single instance" of land use. 115 Cal.App.3d at 161-162 [171 Cal.Rptr. at 256-257].

The conceptual error of the Ninth Circuit, recently vacated in this Court's No.84-1360, and cases requiring independent factual demonstration for legislation is erroneous failure to countenance the normal legislative presumption of constitutionality. But this is simply failure to recognize *Young*'s very narrow, but nevertheless real, rejection of the

"preferred position" of speech in our zoning context. Once *Young* is correctly recognized to be a "standard zoning" decision there will be no impediment to presuming full constitutionality for *Young*-type zoning ordinances, irrespective of express, implied, or "borrowed" factual basis for the ordinance. Ordinary legislation need not show a factual basis, but only reasonableness for its existence.

That is not to say that all manner of porn-zoning ordinances should be immune from attack. *Young* itself commands that zoning not be a subterfuge for "banning" porn. Public accessibility to porn must exist for those who want it; we are generally in accord with those state and federal cases which disallowed municipal "zoning out of existence" the only porn theater in town. Nor do we minimize problems reflected in *Pringle* (1), which do not concern us herein.

However, we must recognize that *Young's* express location (realty) regulation is related

to speech content (porn) by a well-documented and lengthy history of repeated causation, not by fictitious inventions of city planners. According porn-zoning traditional "rational nexus" status, not requiring specific legislative factual showing, allowing "single instance" regulation, and presuming full constitutionality will be salutary recognition of *Young's* necessary implications, yet allow specific attack upon "unreasonable" porn-zoning ordinances which fail to meet *Young's* "public accessibility" and "nonsubterfuge" requirements. Shifting the burden to the attacker rather than the legislature will allow the municipal "experimentation" demanded by *Young*. And it will not compromise the "preferred position" of free speech, except in locational porn-zoning, a *fait accompli* by *Young*, anyway.

Certiorari should be granted herein, that the foregoing necessary implications of *Young* be expressly recognized, that municipal "experimentation" be unfettered by fear of

individualized factual legislative bases nor omnibus assaults from "overbroad", overreaching commercialized speech exploiters, that "single instance of use" be clearly established as actionable porn-zoning, nullifying any "variable" exhibition standard, and that such legislation be presumed constitutional in the absence of any specifically asserted *Young* restriction.

Such clarity is drastically needed for all state and federal courts, that constitutional standards be correctly articulated and porn-zoning receive its legitimate freedom to experiment unhindered by mistaken (but omnipresent) notions of instantly applicable speech supremacy, presumptions of legislative unconsititutionality, and demands for compelling state factual showings, all of which were explicitly considered and rejected by *Young*.

Pringle has not yet established itself as the definitive interpretation of *Young*. The instant decision below could cite only 3

California decisions which have followed it, none of which sought to examine the constitutional assumptions thereof. App.A p. 20. The time is now ripe for reconsideration of *Pringle* (2) with its false constitutional assumptions (continuing to assume "preferred speech" in the *Young* setting), to accord the legislation a presumption of constitutionality, vitiate its unanalyzed rejection of the "single instance of use" (more misanalysis of speech supremacy), its implicit but irrelevant application of majoritorian (50+%) democratic values (nice in elections, not in constitutional analysis), its general failure to isolate and evaluate the constitutional interests of the respective parties, and its wholesale resolution of complex constitutional issues by simply resorting to Websters' *Dictionary*.

"Partial porn" is an idea whose time is effectively here. Now is the time for this Court to speak analytically and rationally to assure *Young's* continued viability in the

partial porn context. If *Pringle (2)* exists *Young* is defunct. But *Young* with the "single instance" standard of use promises a bright line and bright future for municipal experimentation in porn-zoning with no undue infringement of free speech at all.

CONCLUSION

For the foregoing reasons the Writ of *Certiorari* must be granted.

JOHN A. VANDER LANS
CITY PROSECUTOR

ROBERT R. RECKNAGEL
ASSISTANT CITY PROSECUTOR

By Gerry L. Ensley
GERRY L. ENSLEY
DEPUTY CITY PROSECUTOR

INDEX TO APPENDICES

APPENDIX A:

Opinion of the Appellate Department of the Superior Court, County of Lo Angeles, State of California .....

APPENDIX B.:

Order denying rehearing and certification 2

APPENDIX A.

Opinion.

In the Appellate Department of the Superior Court, State of California, County of Los Angeles.

People of the State of California, Plaintiff and Appellant, v. Walnut Properties, Inc. et al., Defendant and Respondent, CR A21481; CR A21482; CR A21483; and CR A21484.

Filed: March 18, 1985.

Appeal by plaintiff from Order of the Municipal Court, Kirk Gustafson, Judge.

Order Affirmed.

For Appellant - John A. Vander Lans, City Prosecutor, Gerry L. Ensley, Deputy City Prosecutor.

For Respondent - Stanley Fleishman.

-oOo-

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about June 20, 1978, respondent was charged in the above-captioned matters with establishing in a zone permitting "motion picture theaters," an "*adult* motion picture

theater," contrary to the provisions of section 9120.41 of the Long Beach Municipal Zoning Ordinance.

Respondent was found guilty of the foregoing charges, following a jury trial. The imposition of sentence was suspended, and respondent was placed on summary probation upon the condition, among others, that the Lakeview [Lakewood] Theater, 4501 East Carson Boulevard, Long Beach, California, not be operated as an "adult theater." A stay of execution was granted pending appeal of the foregoing judgment of conviction.

On or about July 1, 1980, this court

---

[1]Our opinion was rendered in the light of Walnut Properties, Inc. v. City Council of the City of Long Beach (1980) 100 Cal.App.3d 1018, in which the Court of Appeal upheld the constitutionality of section 9120.41 of the Long Beach Municipal Zoning Ordinance. The Court of Appeal held that the ordinance did not violate the First Amendment by restricting the areas of the City of Long Beach in which adult

(Footnote Continued)

affirmed the foregoing judgments of conviction in CR A16848.[1]

On or about May 22, 1981, the City Attorney of the City of Long Beach caused to be served upon respondent a notice alleging that respondent had violated the terms of probation by exhibiting certain adult films, namely "Deep Throat" and "The Devil in Miss Jones" ". . . during the dates of May 1, 2, 7, and 8, 1981" at the Lakewood Theatre.

A hearing on the foregoing allegations was scheduled for June 9, 1981 in the Municipal Court of Long Beach Judicial District,

---

(Footnote Continued)
movies could be shown, since the ordinance did not regulate the content of the films or obstruct access to them. The Court of Appeal stated that a zoning ordinance which is reasonable in object and not arbitrary in operation will be sustained as a legitimate exercise of police power, despite the fact that the ordinance may incidentally limit the time or place of expression protected by the First Amendment.

The net effect of the foregoing opinion of the Court of Appeal was the approval of the Detroit-type Long Beach "scatter" ordinance, locating but not prohibiting, adult entertainment land uses in the City.

following a proceeding relating thereto which had been conducted in said court on May 20, 1981.

Prior to the hearing on June 9, 1981, respondent sought, and obtained, from Department 70 of the Los Angeles Superior Court, a peremptory writ of prohibition, on the ground that that the trial court threatened to act in excess of its jurisdiction in the pending probation violation hearing, in indicating that it would not, or did not have to, apply the definition of "adult theatre" as set forth in *Pringle v. City of Covina* (1981) 115 Cal.App.3d 151.

The People appealed the granting by this court of the foregoing peremptory writ of prohibition and, on January 5, 1983, the Court of Appeal, without reaching the question of the applicability of *Pringle, supra*, reversed the judgment granting the writ of prohibition. (*Miranda, et al v. Municipal Court* 2D CIV. No. 65108.)

The Court of Appeal indicated that the trial court had made no clear ruling as to the applicability of *Pringle*, *supra*, and that the superior court had acted prematurely in that the writ of prohibition cannot be correctly utilized to prevent "anticipated error."

Following the issuance of the remitittur by the Court of Appeal on March 7, 1983, the probation violation hearing ensued on September 22, 1983, before Judge Kirk Gustafson, sitting by assignment of the Judicial Council.[2]

From the reporter's transcript of the probation violation hearing, it appears that the Lakewood Theatre is a motion picture theatre with two interior screening areas. The amended notice of violation of probation, date March 30, 1983, upon the basis of which the

---

[2]The record on appeal indicates that all the judges of the Municipal Court of Long Beach Judicial District recused themselves from hearing the subject probation violation hearing.

probation hearing was conducted, contained the following allegation:

"It has come to our attention during the date of May 1, 2, 7, and 8, 1981 and every weekend thereafter you operated the Lakewood Theatres exhibiting the movies entitled *Deep Throat* and *The Devil and Miss Jones*, said movies being adult movies, as well as other adult movies."

"From the foregoing facts it appears that you are in violation of the terms of your probation in that you have not refrained from exhibiting adult movies at the Lakewood Theatre . . ."

During the course of the probation violation hearing, it was stipulated, in substance, that the total adult film exhibition time never exceeded the non-adult film exhibition time of both interior screens at the Lakewood Theatre.

Following the definition of "adult theatre" set forth by the Court of Appeal in *Pringle*,

supra, the trial judge held that respondent was not in violation of the provisions of

---

[3]Because we were unable to locate case authority clearly establishing the People's right to appeal from an order finding a defendant not to be in violation of probation, following an evidentiary hearing, we asked the parties to submit supplemental briefs on the foregoing issue. The People have filed an extensive letter brief in which they acknowledged that they had been unable to locate case authority in support of the People's right to appeal an order such as that at bench. However, the People argue that an order denying revocation of probation is appealable by the People under the provisions of Penal Code section 1466 (a)(5) as an order made after judgment affecting the substantial rights of the People.

The People argue that they should have such an appellate right because (1) the appeal of an order denying revocation of probation is limited to issues pertaining to the probation revocation hearing, and thus is not an appeal from judgment of conviction, which is not allowable under Penal code section 1466. (See People v. Ventura (1978) 84 Cal.App.3d Supp. 8, 11.) (2) a defendant may appeal an order revoking probation as an order revoking probation as an order after judgment affecting his or her substantial rights. (See People v. Vickers (1972) 8 Cal.3d 451, 453, fn. 2; see, also, Pen. Code § 1466 (b)(2). The People contend, further, that a failure to interpret Penal Code section 1466 (a)(5), as they have suggested, would result in leaving enforcement of the terms of probation solely in the discretion of the trial court, without appellate review, save by extraordinary writ.

(Footnote Continued)

probation.

Thereafter, on October 21, 1983, the People filed a timely notice of appeal from the from foregoing ruling of the court below.[3]

ISSUE ON APPEAL

Counsel for appellant City of Long Beach contends that the trial court committed reversible error in applying the *Pringle* "preponderant exhibition" standard for defining "adult theatre" in connection with the adult entertainment zoning ordinance of the City of Long Beach. (Long Beach Mun. Code § 9120.41.)

DISCUSSION

In pertinent part Long Beach Municipal Code section 9120.41 is as follows:

SECTION 9210.41--Provisions Regulating the

(Footnote Continued)
Respondent has not filed a brief in response to the People's submission.
We hold that the order at bench is appealable by the People under the provisions of Penal Code section 1466 (a)(5), as an order made after judgment affecting the substantial rights of the People.

Location of "Adult Entertainment" Businesses.

(a) Regulated Uses. The City Council finds that "adult entertainment" businesses, because of their very nature, are recognized as having objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances, thereby having a deleterious effect upon the adjacent areas. Special regulation of these businesses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhoods. The primary purpose of the regulation is to prevent the concentration or clustering of these businesses in any one area.

(b) *Definitions.*

1. For purposes of this Section, the "adult entertainment" businesses are defined as follows:

B. "Adult Motion Picture Theater"--An enclosed building with a capacity of fifty or more persons used for presenting material

distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" for observation by patrons therein. . . .

2. For purposes of this Section, "specified sexual activities" shall included the following:

A. Actual or simulated sexual intercourse, oral copulation, anal intercourse, oral anal copulation, bestiality, direct physical stimulation of unclothed genitals, flagellation or torture in the context of a sexual relationship, or the use of excretory functions in the context of a sexual relationship, and any of the following depicted sexually oriented acts or conduct: analingus, buggery, coprophagy, coprophilia, cunnilingus, fellatio, necrophilia, pederasty, pedophilia, piquerism, sapphism, zooerasty; or

B. Clearly depicted human genitals in a state of sexual stimulation, arousal or

tumescence; or

C. Use of human or animal masturbation, sodomy, oral copulation, coitus, ejaculation; or

D. Fondling or touching of nude human genitals, pubic region, buttocks or female breasts; or

E. Masochism, erotic or sexually oriented torture, beating or the infliction of pain; or

F. Erotic or lewd touching, fondling or other contact with an animal by a human being; or

G. Human excretion, urination, menstruation, vaginal or anal irrigation.

3. For purposes of this Section, "specified anatomical areas" shall include the following:

A. Less than completely and opaquely covered (1) human genitals, public region; (2) buttock, and (3) female breast below a point immediately above the top of the areola; and

B. Human male genitals in a discernibly turgid state, even if completely and opaquely

covered.

(c) *Special Regulations.* In those land use districts where the "adult entertainment" businesses regulated by this Section would otherwise be permitted uses, it shall be unlawful to establish any such "adult entertainment" business if the location is:

1. Within five hundred feet of any area zoned for residential use;

2. Within one thousand feet of any other "adult entertainment" business; or

3. Within one thousand feet of any public or private school, park, playground, public building, church, any non-commercial establishment operated by a bona fide religious organization, or any establishment likely to be used by minors.

The "establishment" of any "adult entertainment" business shall include the opening of such a business as a new business, the relocation of such business, or the conversion of an existing business location to

any "Adult entertainment" business use.

In *Pringle v. City of Covina* (1981) Cal.App.3d 151, the Court of Appeal considered and interpreted the adult entertainment zoning ordinance of the City of Covina, which is, for all practical purposes, identical to section 9120.41 of the Long Beach Municipal Code.

In *Pringle*, the court specified that the City of Covina had, in June 1978, enacted a comprehensive zoning ordinance which prohibited the location of "adult entertainment businesses" within 500 feet of a residential area. Pringle's theatre was located within said distance.

The Court of Appeal indicated that the ordinance had stated as its purpose "'to insure that [the] adverse effects [arising from their "serious objectionable operational characteristics"] will not contribute to the blighting or downgrading of the surrounding neighborhood and will not unreasonably interfere with or injure nearby properties.'"

(P. 154.)

The *Pringle* court further stated that under the provisions of Covina Municipal Code section 17.04.026.2 an adult motion picture theatre is defined as "'an enclosed building with a capacity of fifty or more persons *used* for presenting material *distinguished* or *characterized* by an *emphasis* on depicting or describing Specified Sexual Activities" or "Specified Anatomical Areas."'" (P. 155; cit. omit.)

In *Pringle* plaintiffs alleged, in their complaint seeking declaratory and injunctive relief, that *Pringle* operated a neighborhood theatre which showed a variety of films including a few films which, although not obscene, explicitly depicted sexual activity arguably within the scope of the ordinance. Plaintiffs contended that the terms "distinguished or characterized by an emphasis" and "used" were to vague and chilled freedom of expression, in the course of contending that

the ordinance there at bench violated federal and state guarantees of freedom of speech, due process and equal protection.

On Appeal, the *Pringle* plaintiffs contended that the preliminary injunction which they sought in the trial court, and which was denied, should have been granted, because the ordinance of the City of Covina "contains impermissibily vague terms which chilled freedom of expression by deterring the exhibition of films that may or may not be within its ambit."

The Court of Appeal first considered plaintiffs' argument that they could not determine by any objective standard when a film is "distinguished or characterized by" an "emphasis" on the enumerated sexual activities.

While conceding that there was merit to the foregoing argument on the part of plaintiffs, the court asserted its duty to construe the subject legislation in a manner to preserve its constitutionality, if reasonably possible. The

court noted that the United States Supreme Court in *Young v. American Mini Theatres* (1976) 427 U.S. 50, in discussing a vagueness attack on a Detroit ordinance which contained any identical definition of "adult theatre," indicated that it saw no reason why the ordinance in question was not readily subject to a narrowing construction by the state court. In keeping with the foregoing statement of the United States Supreme Court, the Court of Appeal proceeded to narrowly define the language "distinguished or characterized by an emphasis" in order to uphold the validity of the statute, and construed the aforementioned quoted language to refer to the dominant or essential theme. The Court of Appeal specifically held that "adult films under the ordinance include only films whose dominant or predominant character and theme is the depiction of the enumerated sexual activities or anatomical areas. (See Long Beach Mun. Code § 9120.41 (b) 2. and 3., *supra*).

The Court of Appeal next addressed itself to the meaning of the word "used" in the ordinance of the City of Covina defining an adult theatre as a building "used for presenting" sexually explicit material. The court indicated that the ambiguity lay in the failure of the ordinance to indicated what *proportion* of the programming of a theatre would constitute "use."

The Court of Appeal noted that the verb "use" or "used" has two meanings: (1) To employ or be employed or occupied. [The court noted that in this sense the word would include a single isolated instance of use.] (2) To practice customarily or . . . to be the subject of customary practice, employment or occupation. (P. 161; cit. omit.)

In the trial court, defendant City of Covina had claimed that a single exhibition of any one adult film constituted a "use" in violation of the ordinance. The Court of Appeal noted that motion pictures are fully within the protection

of the First Amendment and pointed out that reasonable regulations of the time, place, and manner of protected speech are permitted by the First Amendment only where those regulations are necessary to further significant governmental interests.

The Court of Appeal held that a zoning regulation based on a "single isolated instance of use" could not be justified by the city's interest in preserving the character of its neighborhoods in that it could not be reasonably determined that a single showing of a sexually explicit film produces adverse secondary effects destructive of the general quality of life in a neighborhood.

Referring to the concurring opinion of Powell, J., in *Young, supra*, 427 U.s. at p. 83, the Court of Appeal indicated that a zoning regulation based on a "single isolated instance of use" would lead to the conclusion that it was not so much a zoning regulation to prevent a neighborhood blight, as a misconceived

attempt to regulate content of expression by use of the power to zone. Accordingly, in order to preserve the validity of the ordinance, the Court of Appeal concluded that the term "use" must be construed to mean "to practice customarily." The Court of Appeal held that in order for a theatre to be deemed an "adult motion picture theatre" within the ambit of the zoning ordinance, a *preponderance* of the films shown by the subject theatre must have as a dominant theme the depicture of the ordinance's enumerated sexual activities. (See *Pringle, supra*, at p. 162.)

Notwithstanding the holding of the Court of Appeal in *Pringle, supra*, the city attorney for the City of Long Beach has argued at considerable length, both in the trial court, and in this court, that a *single* showing of an adult film by respondent constitutes a violation of the provision of the probation of respondent prescribing that the Lakewood Theatre not be operated "as an adult motion

picture theatre." The city attorney argues that *Pringle* is "clearly wrong", entitled to no weight, and that it should be declared unconstitutional by this court.

We note, however, that a petition for hearing by the Supreme Court with respect to *Pringle* was denied on March 25, 1981.

We further note that *Pringle* has been approved by three subsequent Court of Appeal decisions.[4]

It was stipulated in the trial court that the motion pictures specifically referred to in the probation violation hearing were adult films as defined in *Pringle*, in that their dominant or predominant character and theme is the depiction of the sexual activities or anatomical areas enumerated in the ordinance at bench. However, the stipulation that the total

---

[4]See Kuhns v. Bd. of Supervisors (1982) [4th Dist., Div. 1] 128 Cal.App.3d 369, 375; Strand Property Corp. V. Municipal Court (1983) [4th Dist. Div. 1] 148 Cal.App.3d 882, 889-890; City of Whittier v. Walnut Properties, Inc. (1983) [2nd Dist. Div. 4] 149 Cal.App.3d 633, 642-643.

adult film exhibition time never exceeded the non-adult film exhibition time of *both* interior screens at the Lakewood Theatre compelled the conclusion of the part trial court that since a preponderance of the films shown by respondent were not such adult films, the Lakewood Theatre could not be deemed an "adult motion picture theater" within the ambit of Long Beach Municipal Code section 9120.41 (b) 1.B., *supra*, in consequence of the holding by the Court of Appeal in *Pringle. Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.

This court is similarly bound by the definitional determinations made by the Court of Appeal in *Pringle*, *supra* and, accordingly, we have no alternative but to affirm the order of the trial court dismissing the probation violation hearing at bench.

Since it appears conceded by the parties that the period of probation pertaining to respondent expired on June 30, 1981, appellant's extensive offer of proof and

exhibits in support thereof, pertaining to alleged activities by respondent following the termination of probation, necessarily involves matter irrelevant to the period of probation, and was properly denied by the the trial court as such material is beyond the parameters of the probation violation hearing. (See Pen. Code § 1203.2 and 1203.3.)

The order of the trial court dismissing probation violation proceedings is affirmed.

B. COOPERMAN
PRESIDING JUDGE

I CONCUR.

H. SHABO
JUDGE

APPENDIX B.

In the Appellate Department of the Superior Court, State of California, County of Los Angeles.

People of the State of California Plaintiff and Appellant, v. Walnut Properties, Inc. et al., Defendant and Respondent. CR A21481; CR A21482; CR A21483; and CR A21484.

Filed: April 18, 1985.

Order denying rehearing and denying certification.

THE COURT: The petition of plaintiff/appellant for a rehearing after judgment of this court on appeal or, in the alternative, certification of cause to the Court of Appeal in the above-entitled case, having been filed and been duly considered,

Said petition is hereby denied.

---

*Before Cooperman, P.J., Shabo, J.